United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2155

To be Argued By
LEONARD D. WEXLER

B
P/C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-2155

NEIL KAMERLING, RICHARD CANTELLO, EDWARD MORAN, JAMES J. SEABARKROB, and JOSEPH J. ANASTASIO,

Plaintiffs-Appellants,

-against-

JOHN T. O'HAGAN, Fire Commissioner, City of New York,

Defendant-Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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INTRODUCTION

The plaintiffs commenced the present action both by an order to show cause dated July 17, 1974 (13a)*, requesting a preliminary injunction and by a summons and complaint (1a-2a) requesting a permanent injunction against enforcement of grooming regulation dated July 1, 1974.

A hearing was held at plaintiffs' request for both a preliminary and permanent injunction on July 23-24 before the Hon. Mark A. Constantino (69a-268a). The court in a written decision found

*Refers to Appendix on Appeal

that since hair longer than permitted by the regulation and facial hair prohibited by the regulation appeared to be a safety hazard, the regulation was a valid exercise of the state's power and therefore denied plaintiffs' request for a preliminary injunction and dismissed plaintiffs' complaint (271a).

The plaintiffs appealed this decision and order in a Notice of Appeal dated and filed on August 14, 1974 (272a).

STATEMENT OF FACTS

Although Fire Commissioner O'Hagan testified that the regulation was issued because of the marked increase in time lost due to heat exhaustion and smoke inhalation in the last two or three months (83a), he could not testify to any specific example where the injury was related either to the length of a fireman's hair, or to a fireman having facial hair in violation of the regulation (87a,94a,95a,111a, 112a). Neither Chief Mendes nor Dr. Seley, both called by the defendant, could testify to any such injuries (126a,131a, 140a,214a,217a,218a,219a) even though Chief Mendes

had a check of hospitals and other medical records done to ascertain such information (258a,259a). Nor was any study, survey or report conducted by the fire department prior to the institution of the regulation to lead the department to the conclusion that the proscribed hair created a safety problem (103a-105a, 129a,219a-220a).

On the issue of whether a fireman could obtain a satisfactory seal with the mask when he had a beard, sideburns etc., again the witnesses called on behalf of the defendant could not testify to any instance where such a seal was not obtained and injury directly resulted therefrom (111a-112a, 126a,140a,218a). This was true even though the face mask in question [Scott Air Pack, Series 6000] had been in use by the New York City Fire Department since 1946 or 1947 (107a-108a) and all three witnesses have been affiliated with the department for a combined period of more than 73 years (79a,211a,253a).

As to the one instance referred to by Commissioner O'Hagan of firemen killed with masks on, (117a), it was unknown whether the men had beards 140a).

Although Commissioner O'Hagan referred to scientific reports on several occasions to justify the regulation (18a,82a) as well as his affiliation with NASA (86a-87a), he testified that NASA did not do any testing themselves, but rather relied on other reports (107a), that he never participated in any testing, just read about them (118a) and discussed the problem with the people at NASA (86a-87a), and that these tests had nothing to do with long hair (118a).

At no time did the defendant introduce any testimony either to establish that any of the masks referred to in the reports were the ones being used by the New York City Fire Department (167a) or to how said tests were conducted and the plaintiffs excepted to their use on this ground (17a-72a,96a). The lack of such a foundation for reliance upon these tests is illustrated by the fact that with certain masks, certain facial hair

did not effect the mask seal (113a-114a,121a).

Commissioner O'Hagan also testified that the fire department had a facility at Welfare Island where they conducted tests with the masks (108a). The tests conducted, included the use of tear gas which all firemen passed (109a); on some individuals they conducted a separate test using banana oil (109a), but Chief Mendes did not know the results of these tests (142a).

Although Commissioner O'Hagan and Chief Mendes stated that the mask test conducted by the department on weekends was the most satisfactory test presently available to the department, they were not completely satisfied with it (117a,123a-125a,136a), yet in examining the plaintiffs the attorney for the defendant kept referring to a photometer which detected leakage

(159a-160a,172a,208a) and the firemen questioned testified they never heard of nor used such a device (160a,172a,208a) therefore if such a device were available to the department (136a) though not used, the department must have been satisfied with the result of the tests they were using.

It should be pointed out that the creditability of Chief Mendes has to be questioned when he stated that a training bulletin of the fire department was a lie (139a).

The plaintiffs and the witnesses called on their behalf having a combined experience of 58 years (148a,164a,174a,184a,191a,202a,221a,224a) testified they never had their hair burn (151a,170a,176a,185a, 204a,205a), although one of the plaintiffs' witnesses and one witness for the defendant stated that they had their hair singed (155a,245a) yet in both cases there was no injury to the firemen and they did not know that their hair had singed until they returned to the firehouse (158a,249a).

On the issue of facial hair and mask seal all

of the plaintiffs and their witnesses testified that they always attained a seal whether in actual firefighting or when tested (149a,166a,175a,186a,191a, 202a-205a,221a-226a). Among the testimony is that of a fireman with a full beard, who was caught in a very intense fire for 10-15 minutes, who was wearing a beard and mask and who attained a satisfactory seal (202-205a), a fireman who had a beard and a mask on at a fire, who received a medal for his rescue work and who attained a seal (222a), the testimony of a Captain who had a beard for several years and attained a seal (222a) and in addition never knew of a person under his command who had a beard and never attained a satisfactory seal (224a-226a), and the testimony of a fireman who was also a scuba diver who always attained a seal when diving (200a-201a).

Plaintiff Kamerling and fireman Ulmer testified that they underwent the special banana oil test at Welfare Island referred to by Commissioner O'Hagan and Chief Mendes (109a,142a), that they both passed the test (150a,191a-192a), and when plaintiff Kamerling stated that there was a report of the test, the court

ordered the defendant to produce the report (152a-153a) but the report which Chief Mendes also referred to (142a) was never produced.

A stipulation was entered on the record that fourteen additional witnesses would testify on behalf of the plaintiffs, and that their testimony would be substantially the same as already heard (189a-236a).

The court during the course of the trial stated several times for the record that hair was flammable (88a,257a) and further over objection stated that it would take judicial notice that hair burns (141a). These statements were made notwithstanding the fact that that on one occasion a fully lit ceiling fell on plaintiff Kamerling's head and that the only effect was that his hair singed but did not burn (154a-155a), and that fireman Collins was caught in a fully involved fire and only suffered burns to those portions of his skin which were not covered by hair and that his hair did not burn (202a-205a).

Not only did the court establish its prejedice in favor of the defendant by overruling several valid objections of the plaintiffs (87a,98a,99a,101a), but stated during Commissioner O'Hagan's direct testimony that the Commissioner had a reputation for forthrightness and reasonableness (92a).

Finally during the course of the hearing the Court made the following statements; that its judgment would be based upon the testimony (73a-74a), that it was its opinion that the scientific tests applied to other masks (167a), that he wanted the results of the banana oil tests (152a-153a), which he never received, that experts would testify to the scientific tests (96a) which they did not, that he could determine if the mask could seal by having a person put one on (169a) which one of the plaintiffs' did and attained a seal (237a-238a), and that in his experience of hearing similar cases [Ammerati et al v. Metropolitan Commuter Transportation Authority, U.S. District Court, E.D. Jan. 18, 1974 Civil Action No. 73C1888] he gained an expertise in the field and

knew of no case where hair caused damage and that the cut-off for length of hair was arbitrary (259a-263a). Yet dispite these statements and the testimony the Court upheld the regulation.

POINT I

THE TRIAL COURT'S CONCLUSION THAT THE DEFENDANT ESTABLISHED A GENUINE PUBLIC NEED FOR THE REGULATION WAS BASED UPON ERRONEOUS FINDINGS OF FACT

The only question on appeal is whether the defendant met his burden "...of establishing a genuine public need for the regulation." Dwen v. Barry, 483 F.2d 1126,1131 (2nd Cir., 1973). Although this court in Dwen speaks of the burden in terms of establishing a reasonable relationship, it seems that in this type of case it is more appropriate that the defendant have the burden of establishing a compelling state interest in order to justify the regulation. See, Breen v. Kahl, 419 F.2d 1034,1036 (7th Cir.,1969).

Since this case brings before the court a question of constitutional law, it is not bound by the findings of the trial court and must make a de nevo review of the facts. See Time, Incorporated

v. Pape, 401 U.S.279,284,91 S.Ct.633,636,637; Firestone v. Time, Inc., 460F.2d 712, 718 (5th Cir., 1972); Guzick v. Drebus, 431 F.2d.594,599, (6th Cir. 1970) Cert. denied 401U.S. 948.

Although the trial court found that hair in violation of the regulation appeared to be a safety hazard (271a) and therefore concluded that the regulation was valid (271a), such findings and conclusions are not supported by the testimony produced at the trial.

It is apparent that not only the defendant but also the court relied heavily upon the two reports which were annexed to the defendant's affidavit in opposition (55a-1). The plaintiffs properly objected to the use of the reports, and they should not have been considered since a proper foundation establishing the relationship between the reports and the mask used by the New York City Fire Department was never established (17a-72a). See, U.S. v. Grabina, 119 F. 2d, 863, 864 (2nd. Cir., 1941).

In view of all of the testimony specifically that of Kamerling (154a-155a) and Collins (202a-205a), as well as the nature of hair itself, it was error for the Court to take judicial notice that hair was flammable and burned (88a,141a,257a), since there is a reasonable doubt that such a fact is a matter of common knowledge and subject to certain verification. See, Brown v. Piper, 91 U.S. 37, 43; Alvary v. United States, 302 F.2d. 790, 794 (2nd Cir., 1962).

Finally, the court committed error and abused its discretion in the latitude it allowed Commissioner O'Hagan in testifying as an expert without any foundation being established. See, Tropea v. Shell Oil Co., 307 F2d.757,763 (2nd.Cir., 1962).

Once the errors of the trial court are corrected it is obvious that the defendant failed to meet his burden and never established the relationship between the need for the regulation and the effectiveness of the department since the remaining testimony establishes that the New York City Fire Department prior to July, 1974, operated without a grooming regulation, (71a), that it had been using the masks in question since 1946-

1947 without incident, and that all of the witnesses who testified having a cumulative experience of 131 years could not testify as to one case where an injury was the direct result, either because hair in violation of the regulation caught on fire or that facial hair prevented a proper mask seal.

That based upon the proper credible testimony in the case, it is respectfully submitted that the trial court's conclusions were based upon erroneous findings of fact, and therefore the decision of the trial court should be reversed.

CONCLUSION

THE TRIAL COURT'S DECISION SHOULD BE REVERSED, AND THE COMPLAINT REINSTATED.

Dated: November 26th, 1974

Respectfully submitted,

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STATE OF NEW YORK)
)ss:
COUNTY OF SUFFOLK)

MARGARET M. DUFFY, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Hauppauge, New York.

That on November 27, 1974 deponent served two (2) copies of the within Brief upon ADRIAN P. BURKE, ESQ., NEW YORK CITY CORPORATE COUNSEL, attorneys for Appellee in this action, at Municipal Building, New York, New York 10007, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Margaret M. Duffy
Margaret M. Duffy

Sworn to before me this
27th day of November, 1974

Richard T. Haefeli

RICHARD T. HAEFELI
NOTARY PUBLIC, State of New York
No. 52-1616207, Suffolk County
Term Expires March 30, 1975

MEYER & WEXLER
ATTORNEYS AT LAW